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No. 85-2116

In The
Supreme Court of the United States
October Term, 1985

COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

TERRY E. BRANSTAD, and the STATE OF IOWA, RONALD CALDER, Intervenor,
Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the well-established and uncontroversial rule in *Kentucky v. Dennison,* 65 U.S. (24 How.) 66 (1861), which precludes a federal court from issuing a writ of mandamus to compel a governor of a sovereign state to extradite a citizen to another sovereign state pursuant to Article IV, section 2 of the Constitution, should be overruled at the request of the Commonwealth of Puerto Rico, a territory of the United States.

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The Respondents herein offer this joint brief in opposition to the petition for writ of certiorari in the above captioned matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2, Cl. 2 of the Constitution of the United States, the Extradition Clause, provides that:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the execu-

tive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction over the Crime.

The Extradition Clause is implemented by the Extradition Act, 18 U.S.C. Section 3182, which provides that:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, district or Territory to which the person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

STATEMENT OF THE CASE

In this unusual proceeding, the Commonwealth of Puerto Rico seeks to conscript the federal courts in its political battle with two governors of Iowa over the extradition of Ronald Calder, a citizen of Iowa who presently resides in Sioux City. Calder has been charged by Puerto Rican authorities with murder in connection with

an automobile accident which occurred in San Juan on January 21, 1981. Two consecutive Iowa governors declined to extradite Calder to face murder charges.

In 1983, Puerto Rico sought leave to file an original complaint with this Court. The State of Iowa resisted, arguing *inter alia* that because the Commonwealth of Puerto Rico was a territory, it could not invoke this Court's original jurisdiction as a "controversy between two or more states." Article III, section 2. This Court denied leave to file the complaint. *Puerto Rico v. Iowa,* — U.S. — (1984) 52 U.S.L.W. 3509 (Jan. 9, 1984).

Puerto Rico then filed this action in federal district court seeking a writ of mandamus to compel the Governor of Iowa, The Honorable Terry E. Branstad, to extradite Calder. Relying on *Kentucky v. Dennison,* 65 U.S. (24 How.) 66 (1861), the district court dismissed the action. The United States Court of Appeals for the Eighth Circuit affirmed. *Commonwealth of Puerto Rico v. Branstad,* 787 F.2d 423 (8th Cir. 1986). Puerto Rico then filed the instant petition with this Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The holding of Kentucky v. Dennison has been cemented into our constitutional bedrock for 125 years.

The holding of *Kentucky v. Dennison,* 65 U.S. (24 How.) 66 (1861) has been a part of our constitutional framework for well over a century. Since the case was

decided, demanding states have launched virtually no litigation in the extradition context in state forums, and other than this case, lower federal courts have not chafed under the restraints of *Kentucky v. Dennison*. The holding simply has been widely embraced as the law of the land by the fifty sovereign states who are vitally concerned with extradition matters. Rarely in the annals of this Court has a decision distributing powers between the governors of sovereign states and the federal judiciary been so thoroughly and comfortably integrated into the body of constitutional jurisprudence.

The Commonwealth of Puerto Rico now seeks to disturb this exceptional tranquility.[1] Puerto Rico claims that the decision in *Kentucky v. Dennison* "cannot be understood apart from the context in which the case was decided: the growing schism between the North and South over slavery." Petition at 18. Puerto Rico apparently sees *Kentucky v. Dennison* as an undigested, unaccepted precedent of this Court to be discarded as an historical oddity.

Puerto Rico's approach is legally and historically inaccurate. *Kentucky v. Dennison* can be, and was, understood apart from the context in which the case was decided. Indeed, this court affirmed the principle *after* the Civil

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[1]There is substantial doubt whether Puerto Rico may invoke the provisions of Article IV, section 2 of the Constitution, which applies on its face only to extradition requests from *states*. Puerto Rico relies on doubtful dicta in *Kopel v. Bingham*, 211 U.S. 468, 479 (1909), a habeas corpus case, for the proposition that demanding territories are to be treated as states in actions to force rendition of a fugitive. The parties below apparently recognized, however, that the issue need not be reached in light of the all encompassing precedent afforded by *Kentucky v. Dennison*. Because Puerto Rico is not a sovereign state, this case may not be the best vehicle to reconsider *Kentucky v. Dennison*.

War and *after* it was clear beyond doubt that there would never again be persons fleeing prosecution for violation of fugitive slave acts. *Taylor v. Taintor,* 83 U.S. (16 Wall.) 366, 370 (1873).

Recent commentary has also accepted the *Dennison* rule. One observer has noted that "the *Dennison* holding was proper and is supported by the concept that federal courts were not empowered to exercise mandamus to compel the governor of a state to fulfill his mandatory duties". Comment, *Interstate Extradition: Should the Asylum State Have Unbridled Discretion,* 1980 Brigham Young Univ. L.Rev. 376, 392. Another commentator has noted with approval that "the central role which the governor plays in the rendition process is not only firmly established, but constantly accentuated in recent uniform legislation." Comment, *Interstate Rendition: Executive Practices and the Effects of Discretion,* 66 Yale L. Rev. 97, 112 (1956). The writer further concluded that "total abolition of executive discretion" would be "unrealistic and unwise." *Id.* at 115.

There has been no trend to depart from the rule of *Kentucky v. Dennison* in cases arising under state constitutional provisions. *See* Abrahamson, *Extradition in America: Of Uniform Acts and Governmental Discretion,* 33 Baylor L. Rev. 793, 803 (1981); Note, *The Extradition Clause: Asylum From the Warrant Requirements of the Fourth Amendment,* 16 Houston L.Rev. 975, 978 n. 6 (1980). In cases brought under state constitutional provisions, of course, the state supreme courts are free to depart from federal precedents. It is a striking historical fact that in the laboratory of federalism, not one of

the fifty states has departed from *Kentucky v. Dennison* in twelve decades of experimentation. *See e.g. People v. Millspaw,* 257 A.D. 40, 41, 12 N.Y.S. 2d 435, 437, *rev'd on other grounds,* 281 N.Y. 441, 24 N.E.2d 117 (1939); *State v. Coughlin,* 90 Wash. 2d 835, 838, 556 P.2d 1145, 1147 (1978); *In re Wallace,* 38 Wash. 67, 69, 227 P.2d 737, 738 (1951); *Carpenter v. Lord,* 88 Or. 128, 132, 171 P.2d 577, 578 (1918).

In the most recent case, *South Dakota v. Brown,* 576 P.2d 473 (1978), the California Supreme Court refused to issue a writ of mandamus pursuant to a state constitutional provision to compel the Governor of California to extradite a fugitive to South Dakota. The California Supreme Court noted that it "is generally accepted that federal courts lack authority to compel a Governor to deliver a fugitive to the demanding state." 576 P.2d at 476. In interpreting an apparently mandatory provision of the California constitution, the California Supreme Court refused to adopt "a harsh rule" contrary to *Kentucky v. Dennison.* 576 P.2d at 482.

In short, *Kentucky v. Dennison* has been cemented into our legal tradition for over a century. Puerto Rico has not made a persuasive case for using a constitutional jack-hammer to pry it loose.

II. The holding of Kentucky v. Dennison embraces the sound constitutional policy of respect for sovereign states and their chief executives.

Puerto Rico cites numerous cases under the interstate commerce and due process clauses which outline the expanding role of federal courts in our society. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority,* —

U.S. —, 105 S.Ct. 1005 (1985); *FERC v. Mississippi*, 456 U.S. 742 (1982); *Brown v. Board of Education*, 347 U.S. 483 (1954). These commerce and due process cases, directed primarily at local officials, do not involve orders to governors of sovereign states that in effect direct them to dispatch police officers to arrest citizens for transport abroad for crimes of a questionable character.

The federal judiciary has always treaded lightly in criminal law enforcement matters involving decisions made by governors of sovereign states. Particularly in extradition disputes, the federal judiciary is ill-suited to adopt an aggressive enforcement role.

Extradition cases in the child custody context present an example of some of the domestic interstate difficulties faced by chief executives that are not amenable to federal judicial resolution. Sometimes the courts of two different states come to opposite conclusions on child custody issues. *See* Scoles and Hay, *Conflict of Laws*, § 15.41-46 (1982). *Cf., May v. Anderson*, 345 U.S. 528 (1953). A spouse awarded custody under a lawful order in state A may travel to state B, seize the child, and return home. State B could then charge the spouse with kidnapping because the state courts in state B, contrary to the courts in state A, may have awarded custody to the other spouse who resides in State B. State B might then seek to extradite the seizing spouse. Under Puerto Rico's approach, the governor of state A, if presented with appropriate extradition papers, would have no choice but to extradite the spouse even though he was acting under a lawful custody order from state A.

This Court should stand clear of the nasty political thicket presented in child custody and other sensitive ex-

tradition cases. The resolution of these disputes is best left to the governors of the sovereign states to resolve through the exercise of their executive power.

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CONCLUSION

Kentucky v. Dennison has been cemented into our legal tradition for over a century. Overruling of this established precedent would thrust the Court into nasty political thickets that are best left undisturbed by judicial intervention. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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